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No. 99-1906

IN THE

Supreme Court of the United States

LOUIS LOWERY, WILL LIVINGSTON, MICHELLE BROOKS and LATOSHA LINDSAY,

Petitioners,

v.

JESS BURGESS and MARILYN THOMPKINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Summary

Petitioners do not raise any issue meriting certiorari review in their petition to this Court. The Seventh Circuit Court of Appeals held the law was clearly established that petitioners' conduct in strip searching respondents, respectively the father and wife of Illinois prisoners, was unconstitutional absent reasonable suspicion to believe they were concealing contraband. (Pet. App. 1, 10-11) [1] This Court has provided ample guidance on the qualified immunity question, and it is for the lower courts to determine after reviewing all relevant authority whether or not the law was clearly established in order to hold a government official liable for unlawful conduct.

Any perceived conflict in principle or in analysis among the circuits as to the relevant universe of decisional law which may be considered when conducting a qualified immunity analysis does not exist subsequent to the circuits' interpretation and application of this Court's recent pronouncements in *Wilson v. Layne*, 526 U.S. 603 (1999). There is, therefore, no compelling reason to grant certiorari review of this case.

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1. The Seventh Circuit Court of Appeals opinion is reported at 201 F.3d 942 (7th Cir. 2000) and is set out at pages 1-11 of the appendix to Petitioners' Petition for Writ of Certiorari, referred to herein as Pet. App. __, including the relevant page number.

I. This Court Has Provided Sufficient Guidance Regarding the Relevant Universe of Decisional Law to Be Considered in Determining Whether or Not an Official is Entitled to Qualified Immunity.

Over the last two decades, this Court has provided significant guidance as to the meaning of "clearly established law" for qualified immunity purposes. The ultimate task of reviewing the available decisional law and determining whether or not the weight of authority clearly establishes the law providing a reasonable government official with fair notice that certain conduct is unlawful is properly left to the lower federal courts.

The defense of qualified immunity is unavailable to government officials when their conduct violates a constitutional right that was clearly established at the time the official acted. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wilson v. Layne*, 526 U.S. 603 (1999). The doctrine of qualified immunity seeks to strike a balance between shielding officials performing discretionary functions from liability and "the public interest in deterrence of unlawful conduct and in compensation of victims." *Harlow* at 819; *see also Elder v. Holloway*, 510 U.S. 510, 515 (1994).

Although the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," it is not required that a prior case exist holding identical conduct to be unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Qualified immunity dispositions are to be "conducted in light of all relevant precedents." *Elder v. Holloway*, 510 U.S. 510 (1994). In *Elder*, this Court remanded the case for

"the Court of Appeals to consider, in light of all relevant authority" whether or not the officials were entitled to prevail on their qualified immunity defense. *Elder* at 516.

This Court recently held that the "universe of relevant interpretative decisions" is not confined to "our opinions" and pointed to other cases in which decisions of the Courts of Appeals were considered. *United States v. Lanier*, 520 U.S. 259, 269 (1997). In *Lanier* the "fair warning" requirement for violation of 18 U.S.C. § 242 was determined to be the same as the "clearly established" immunity standard for violation of 42 U.S.C. § 1983. This Court then rejected application of "a categorical rule" that excluded consideration of decisions of out-of-circuit Courts of Appeals and other courts while simultaneously recognizing that "disparate decisions in various Circuits might leave the law insufficiently certain" to clearly establish the law or provide "fair warning" to government officials. *Lanier* at 269.

Just last year this Court again reviewed the "clearly established law" standard in the qualified immunity analysis in *Wilson v. Layne*, 526 U.S. 603 (1999). The Court held that media representatives' accompanying government officials during an attempt to execute a search warrant in a home violated the Fourth Amendment, but the law was not yet clearly established in 1992 when the conduct occurred. In reaching this decision, all relevant decisional law was considered, including a published state intermediate court decision directly on point, two unpublished federal district court decisions, an out-of-circuit Court of Appeals case, as well as the written policies of the United States Marshals Service. This Court recognized that a consensus of case authority can clearly establish the law:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, *nor have they identified a consensus of cases of persuasive authority* such that a reasonable officer could not have believed that his actions were lawful.

Wilson at 617 (emphasis added).

II. The Seventh Circuit's Decision Conforms to This Court's Definition of Clearly Established Law.

The Seventh Circuit's analysis of the qualified immunity issue in this case fully comports with the holdings and principles articulated by this Court in *Harlow*, *Anderson*, *Elder*, *Lanier* and *Wilson*. The Seventh Circuit held, consistent with *Lanier*, that the absence of a decision by the Supreme Court or the Seventh Circuit Court of Appeals "cannot be conclusive on the issue of whether [or not] a right is clearly established in this circuit." (Pet. App. 4). The court further explained that a lack of Supreme Court or Seventh Circuit precedent may simply mean that the right was so clear no one thought it worthwhile to litigate the issue and to require such precedent would discourage litigants from being the first to bring a damages suit. (Pet. App. 4).

The Seventh Circuit Court of Appeals decision recognized "a long and unbroken series of decisions by our sister circuits stretching back to the early 1980's" which clearly established the law well in advance of the conduct of

petitioners. (Pet. App. 4).[2] The only aberration to this overwhelming and unbroken consensus of decisional law were two earlier Hawaii state criminal cases.[3]

The Seventh Circuit recognized that the Hawaii cases came "at the very outset of the case development, so that

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2. Not surprisingly, *all* the circuit level decisions involving prison visitor strip searches have utilized the Fourth Amendment reasonableness standard and have determined that such searches are unreasonable unless there is individualized reasonable suspicion. At the time petitioners strip searched Mr. Burgess and Ms. Thompkins, the First, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits had all separately concluded that a prison visitor may not be subjected to a strip search under the Fourth Amendment unless prison officials have reasonable suspicion to believe the visitor is concealing contraband. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 563 (1st Cir. 1985); *United States v. Johnson*, No. 93-5792, 1994 WL 260806 (4th Cir. June 15, 1994) (unpublished opinion); *Thorne v. Jones*, 765 F.2d 1270, 1276 (5th Cir. 1985); *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991); *Washington-Boney v. Illinois Department of Corrections*, 1992 U.S. App. LEXIS 28463 (7th Cir. 1992) (unpublished opinion); *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982); *Martinez v. County of San Diego*, No. 90-56277, 1992 WL 98452 (9th Cir. May 8, 1992) (unpublished opinion). The Second Circuit later joined in this unanimous consensus, *Varrone v. Bilotti*, 123 F.3d 75 (2d Cir. 1997), and the Tenth Circuit also recognized that reasonable suspicion is required before a prison visitor may be strip searched. *Romo v. Champion*, 46 F.3d 1013, 1020 (10th Cir. 1995); *Boren v. Deland*, 958 F.2d 987, 988 (10th Cir. 1992).

3. *See State v. Custodio*, 607 P.2d 1048 (1980) and *State v. Martinez*, 580 P.2d 1282 (1978). *But see Martinez v. County of San Diego*, 962 F.2d 14, 1992 WL 98452 (9th Cir. 1992) ("[P]rison visitors had a clearly established right to be free from strip searches not founded on reasonable suspicion that contraband might be found.").

one may doubt whether they would be followed by the Supreme Court of Hawaii today, two decades later." (Pet. App. 10-11). The Seventh Circuit reasonably and correctly concluded that two or more disparate decisions from a single court do not provide government officials with an "automatic safe harbor" if there exists overwhelming authority to the contrary. (Pet. App. 6).[4]

III. Petitioners Overemphasize the Variations Among the Circuits in Defining Clearly Established Law.

Petitioners wrongly assert that an intolerable conflict exists among the circuits with regard to the relevant universe of decisional law to be considered by Article III courts in determining whether or not the law is clearly established. All cases cited by petitioners, which they claim establish a conflict worthy of this Court's review, were decided prior to this Court's most recent qualified immunity decision in *Wilson v. Layne.*

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4. Application of an "automatic safe harbor" rule in this case would not only be contrary to Supreme Court precedent, but would belie the genuineness of Petitioner's immunity position. Indeed, Petitioner Lowery, the individual responsible for ordering the strip searches in this case, was previously sued by a prison visitor for an unlawful strip search. The Seventh Circuit held in an unpublished opinion that strip searches of prison visitors are prohibited absent reasonable suspicion. *Washington-Boney v. Illinois Dept. of Corrections*, 1992 U.S. App. LEXIS 28463 (7th Cir. 1992). Seventh Circuit Rule 53(b)(2) provides that unpublished opinions of the Seventh Circuit may be precedent to support claims of collateral estoppel. *See also Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore* 439 U.S. 322 (1979). Moreover, Petitioners were also aware that Illinois prison regulations specifically forbid strip searches unsupported by reasonable suspicion. 20 Ill. Adm. Code. Sec. 501.220(a)(3). (Pet. App. 1).

This Court has made clear that federal courts may consider — and indeed, may ultimately reject — out-of-circuit authority. For example, the First Circuit refused "to adopt either a hard-and-fast rule that precedent from another circuit is always determinative of whether a law is clearly established or a rule that such precedent is always irrelevant." *El Dia, Inc. v. Rossello*, 165 F.3d 106, 110 n.3 (1st Cir. 1999) (citations omitted).

Petitioners highlight the Fifth and Eleventh Circuits as jurisdictions applying a restrictive rule that allows only controlling precedents to be considered in determining whether or not the law was clearly established. The two cases cited by petitioners from the Fifth Circuit were decided prior to both *United States v. Lanier* and *Wilson v. Layne*. The single case cited from the Eleventh Circuit also was decided prior to *Wilson v. Layne*. Certiorari should not be granted because any perceived conflict in the Fifth or Eleventh Circuits will likely be resolved as these circuits' decisions reflect consideration of *Wilson v. Layne*.

Moreover, the petitioners fail to bring to this Court's attention the intramural nature of the conflict that existed within the Eleventh Circuit even prior to *Wilson v. Layne*. Ten years ago the Eleventh Circuit recognized that the holding in *Harlow* requires "we look to the law established by the Supreme Court, the courts of appeals and the district courts." *Greason v. Kemp*, 891 F.2d 829, 833 (11th Cir. 1990). Although this Court had not spoken on the specific issue of a prisoners' right to psychiatric care, the Eleventh Circuit held the law was clearly established based on the relevant decisions of other out-of-circuit courts of appeals decisions.

Moreover, a number of justices for the Eleventh Circuit Court of Appeals specifically recognized that out-of-circuit courts of appeals precedent are relevant to the qualified immunity analysis even prior to *Wilson v. Layne*. *See Jenkins v. Talladega City Board of Education*, 115 F.3d 821 (11th Cir.) (*en banc*) (Senior Circuit Judge Kravitch's dissent joined by Chief Judge Hatchett and Judge Barkett), *cert. denied*, 118 S. Ct. 412 (1997); and *Gold v. Ross*, 121 F.3d 1442 (11th Cir. 1998) (Judge Barkett's dissent to rehearing *en banc*). Thus, the Eleventh Circuit was already moving toward conformity with this Court's later pronouncements in *Wilson* and *Lanier*.

The Fifth Circuit never squarely addressed the quantum of out-of-circuit precedent that may be sufficient to clearly establish the law in the absence of Supreme Court or Fifth Circuit authority.[5] However, recent language emanating from members of the Fifth Circuit Court of Appeals suggests that the Fifth Circuit, too, stands poised to reject a more restrictive definition of clearly established law and follow this Court's guidance. In a recent case decided after *Lanier*, the "fair warning" issue was not squarely presented or discussed in the majority opinion. Notwithstanding, a concurring justice addressed the issue, *sua sponte*, and specifically sanctioned consideration of out-of-circuit decisions. *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) (Judge Dennis' concurring opinion).

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5. Petitioners cite two cases in support of their position, however, *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995) merely held that "[o]ur inquiry [into what was clearly established law] ends, if we find from examining the decisions of the Supreme Court and our own decisions that the law was clearly established in this circuit," and *Guanaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995) held the law was not clearly established but does not mention if any out-of-circuit authority to the contrary even existed.

This Court has correctly refused to set forth a categorical rule to determine the precise parameters of the decisional law which may be considered by Courts of Appeal in determining "fair notice" or "clearly established law." Rather, this Court has implicity recognized the competence and providence of the lower courts to review the universe of decisional law and determine whether or not the weight of authority exists to clearly establish the law.

The Courts of Appeal in the Fifth and Eleventh Circuits will continue to hone their definition of clearly established law as the issue is presented and with the recent guidance of this Court. Certiorari should be denied due to the likelihood that these issues will be resolved as tribunals are allowed "to serve as laboratories" providing further study prior to determination by this Court. *McCray v. New York*, 461 U.S. 961 (1983) (cert. denied).

The Seventh Circuit's conclusion that a unanimous consensus of all circuit level decisions to decide an issue over the course of two decades may clearly establish the law for qualified immunity purposes is consistent with this Court's pronouncements. Petitioners here can point to no conflicting authority in any circuit after *Wilson v. Layne.*

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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